IN THE
MISSOURI SUPREME COURT

WALTER STOREY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 85980
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
11TH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE NANCY SCHNEIDER, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Both original Statements are incorporated here.

INTRODUCTION - RELIABILITY IS THE TOUCHSTONE

Throughout respondent's brief it has argued that Tim could not have been prejudiced by counsel's ineffectiveness because three jury's have imposed death. The number of prior death verdicts, however, proves nothing.

This Court reversed *Storey I* because counsel was ineffective for failing to object to Prosecutor Hulshof's improper penalty arguments. *State v. Storey*, 901 S.W.2d 886, 900-03 (Mo. banc 1995). Hulshof's penalty argument had four types of errors including one that was "**grossly improper**." *Id*. at 900-03 (emphasis added).

The death sentence imposed in *Storey II* was reversed because the trial court failed to give a "no adverse-inference" instruction. *State v. Storey*, 986 S.W.2d 462, 464-65 (Mo. banc 1999). This Court found the failure to give that instruction prejudicial, like it did Hulshof's argument in *Storey I*. In contrast, this Court has found the failure to give that same instruction was harmless. *See State v. Edwards*, 116 S.W.3d 511, 539-43 (Mo. banc 2003)

"Because the death penalty is unique 'in both its severity and its finality,' [citation omitted] we have recognized an acute need for *reliability* in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721,732 (1998) (emphasis added). When this Court reversed the *Storey I* and *II* penalty phases, this Court concluded that those penalty phases were not reliable. For respondent to now point to two unreliable prior penalty phases as proof of lack of prejudice conflicts with longstanding Eighth Amendment jurisprudence. It simply cannot

logically follow that two prior constitutionally unreliable death sentences somehow make a third death sentence reliable. The record demonstrates that, like the prior penalty verdicts, the third one is also unreliable for multiple reasons and must be reversed.

POINTS RELIED ON

I. FAILURE TO IMPEACH TIM'S EX-WIFE KIM AND OBJECT TO TESTIMONY

The motion court clearly erred denying claims counsel was ineffective for failing to impeach Tim's ex-wife Kim's abuse accusations with Kim's love letters and birthday card sent to Tim while he was incarcerated awaiting the original 1991 trial as these items were not hearsay because at the first trial Kim testified about them when defense counsel cross-examined her about them, the first trial's prosecutor (Hulshof) had "no objection" to their admission, and Hulshof's redirect questioning sought to rehabilitate Kim. Tim was prejudiced because the contents of these items seriously impeached Kim's representations that Tim abused her and specifically impeached her claims of sexual violence by Tim which respondent presented to support its evidence in aggravation that Tim had attempted to sexually assault Ms. Frey.

Further, counsel was ineffective for failing to call Kim's other ex-husband, Andy Posey, to testify she fabricated abuse accusations against Andy because Kim's credibility as to Tim's alleged violent past was a key factor for assessing punishment and not a collateral issue.

Lastly, the decision to not offer testimony from Kim's marital problems confidant, Sheriff Brogden, was not reasonable strategy because evidence Kim had never reported Tim had abused her would have impeached her credibility and not presenting Brogden's testimony to avoid evidence of

Tim's motorcycle conviction was not reasonable strategy because that evidence was inadmissible as that conviction was vacated.

Tim was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have used all this evidence to impeach Kim and to mitigate punishment and Tim was prejudiced because there is a reasonable probability the jury would have imposed life.

State v. Long, 140 S.W.3d 27 (Mo. banc 2004);

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

State v. Storey, 986 S.W.2d462 (Mo. banc 1999);

State v. Thompson, 985 S.W.2d 779 (Mo. banc 1999); and

U.S. Const. Amends. VI, VIII, and XIV.

II. JURY KNEW PRIOR DEATH RESULT

The motion court clearly erred overruling Tim was denied his rights to due process, freedom from cruel and unusual punishment, a fair trial, a fair and impartial jury, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, when counsel failed to call Judge Cundiff at the juror misconduct hearing before Judge Schneider to testify after he told the jurors Tim was previously death sentenced a juror stated "I knew that" and failed to call Bailiff Paulson to testify he saw a juror nodding affirmatively in response to Cundiff because juror misconduct was established when Cundiff disclosed what he heard, reasonable counsel would have investigated Paulson because the State's own attorney (Ahsens) represented at the posttrial juror hearing that there were two bailiffs, not one, who had knowledge relevant to this issue such that Judge Cundiff thereby had not excluded Paulson as a bailiff with critical relevant information and respondent's other attorney (Moss) had spoken to Paulson about this issue.

Dorsey v. State, 156 S.W.3d 825 (Mo. App., W.D. 2005);

Monge v. California, 524 U.S. 721 (1998);

State v. Tirado, 599 S.E.2d 515 (N.C. 2004); and

U.S. Const. Amends. VI, VIII, and XIV.

III. JUROR TESTIMONY PROHIBITED

The motion court clearly erred prohibiting 29.15 counsel from calling jurors to testify at depositions and at the 29.15 hearing because those actions denied Tim his rights to due process, a full and fair hearing, to be free from cruel and unusual punishment, and to prove ineffective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that at the juror misconduct hearing in front of Schneider the jurors should have been told that when Cundiff was in the juryroom and he informed the jury of the prior death verdicts he heard a juror say "I knew that" and the jurors should have been asked who the juror was that made that statement because Judge Cundiff was "confident" one or more jurors had heard what he heard as such inquiry does not constitute "impeaching the verdict."

Baumle v. Smith, 420 S.W.2d 341 (Mo. 1967);

Dorsey v. State, 156 S.W.3d 825 (Mo. App., W.D. 2005);

Stotts v. Meyer, 822 S.W.2d 887 (Mo. App., E.D. 1991); and

U.S. Const. Amends. VI, VIII, and XIV.

ARGUMENT

I. FAILURE TO IMPEACH TIM'S EX-WIFE KIM AND OBJECT TO TESTIMONY

The motion court clearly erred denying claims counsel was ineffective for failing to impeach Tim's ex-wife Kim's abuse accusations with Kim's love letters and birthday card sent to Tim while he was incarcerated awaiting the original 1991 trial as these items were not hearsay because at the first trial Kim testified about them when defense counsel cross-examined her about them, the first trial's prosecutor (Hulshof) had "no objection" to their admission, and Hulshof's redirect questioning sought to rehabilitate Kim. Tim was prejudiced because the contents of these items seriously impeached Kim's representations that Tim abused her and specifically impeached her claims of sexual violence by Tim which respondent presented to support its evidence in aggravation that Tim had attempted to sexually assault Ms. Frey.

Further, counsel was ineffective for failing to call Kim's other ex-husband, Andy Posey, to testify she fabricated abuse accusations against Andy because Kim's credibility as to Tim's alleged violent past was a key factor for assessing punishment and not a collateral issue.

Lastly, the decision to not offer testimony from Kim's marital problems confidant, Sheriff Brogden, was not reasonable strategy because evidence Kim had never reported Tim had abused her would have impeached her credibility and not presenting Brogden's testimony to avoid evidence of

Tim's motorcycle conviction was not reasonable strategy because that evidence was inadmissible as that conviction was vacated.

Tim was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would have used all this evidence to impeach Kim and to mitigate punishment and Tim was prejudiced because there is a reasonable probability the jury would have imposed life.

Counsel failed to present Tim's ex-wife Kim's love letters and birthday card sent to Tim while he was incarcerated awaiting the original 1991 trial to impeach her abuse accusations. Also, counsel failed to impeach Kim's testimony by calling her other ex-husband, Andy Posey, to testify she fabricated abuse accusations against Andy. Additionally, counsel failed to offer testimony from Kim's marital problems confidant, Sheriff Brogden, that she had never reported Tim had abused her which would have impeached her credibility. Tim was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.[1]

A. Kim's Letters And Birthday Card

[1] This reply brief does not discuss counsel's failure to object to Kim's testimony referencing her having become an upstanding Christian because no response is necessary.

The respondent asserts multiple grounds for why counsel was not ineffective for failing to impeach Kim with her love letters and birthday card sent to Tim while he was awaiting his original 1991 trial(Resp.Br.32-33). Respondent argues counsel was not ineffective because the second, 1997 trial court had excluded the letters based on their sexually explicit content and as hearsay(Resp.Br.32-33). Respondent also asserts that because the letters were eight years old they were not relevant(Resp.Br.33). None of these responses have merit.

1. <u>This Evidence Was Admissible</u>

At the 1991 first trial, the prosecutor (Hulshof) had "no objection" to any of the content of these three items and Kim read all of them to the jury and they were admitted(1stTrialTr.956-63(Vol. V);Repl.Br.App.A1-9). When a party states "no objection" to admitting evidence then any entitlement to complain about the use of that evidence is waived. *State v. Yole,* 136 S.W.3d 175,179-81 (Mo. App., W.D. 2004). When Hulshof had "no objection" to this evidence in the first trial, respondent forfeited any grounds for asserting that it was inadmissible at the later trials. It was error for the second trial judge to have excluded the evidence on any ground.

Hearsay is a statement from an out of court declarant offered for its truth. *See, e.g., State v. Lee,* 841 S.W.2d 648, 652-53 (Mo. banc 1992). Kim was not an out-of court declarant, she testified at the first trial about and read her sentiments contained in the two letters and birthday card(1stTrialTr.956-63). Thus, the

content of the writings was not hearsay. Moreover on redirect at the first trial, Hulshof concluded his questioning by attempting to minimize the impeaching effect of the sentiments Kim had expressed in these documents with the following:

Q. -- I'm sorry, Miss Walters, did you love Tim?

A. Yes, I did.

Q. In fact, even today as you sit here, are there still some feelings there?

A. Yes, sir, there are, but it's because we had a child together, that's all. (1stTrialTr.985).

The problem with hearsay testimony is the lack of opportunity for cross-examination. *See*, *e.g*., *State v. Boyer*, 803 S.W.2d 132, 135 (Mo. App., S.D. 1991). Prior sworn testimony from an absent witnesss is admissible when there was the opportunity for cross-examination. *See*, *e.g.*, *Maturo v. Stone*, 856 S.W.2d 84, 85-86 (Mo. App., E,D. 1993). Similarly, here not only on redirect was there the opportunity to question Kim about the content of these documents, but also Hulshof attempted to rehabilitate Kim's credibiltity.

The content of these documents was not hearsay because Kim had testified in court about her sentiments, and thus, she was not an out of court declarant. Moreover, Hulshof had the opportunity and actually utilized his redirect to try to rehabilitate Kim.

Respondent's assertions that the explicit sexual content of these documents is somehow a proper ground for exclusion has no merit. The documents are only explicit in the sense that they contain Kim's statements of her desires to have sex

with Tim. Those documents do not in any way graphically depict consensual sexual acts like those this Court found were improper for the State to have admitted against the defendant in *State v. Barriner*, 34 S.W.3d 139, 145-46 (Mo. banc 2000). These documents severely impeach Kim's credibility on her reporting that Tim was sexually violent towards her because if those accusations were true, then she would not have been writing to him at the St. Charles Jail expressing her desires to have sex with him.

2. <u>Tim Was Prejudiced</u>

Respondent presented evidence Ms. Frey was found naked from the waist down (3rdTrialTr.936), died from stab wounds (3rd TrialTr.913-16), and then argued Tim had attempted to rape her(3rdTrialTr.1669-70,1696). Respondent's case for death was based on the facts of this offense and showing an alleged similarity of conduct in Tim's treatment of Kim. Specifically, Kim's second trial's testimony was presented to show Tim was a violent abuser who had cut her genitals while they were having sex and on a second occasion had raped her(*See* App.Br. at 40-41).

Beimdiek considered the contents of all three documents to be critical to the defense she wanted to present. Her goal was to rebut Tim had been violent to Kim(2ndR.Tr.196). Beimdiek prepared a memo for her intended cross which indicated Beimdiek intended to cross Kim on the birthday card (Ex.A) (present Ex.218) (Repl.Br.App.A10-12) and two letters (Exs.B,C) (present Exs.219,220) (Repl.Br.App.A13-17). (*See* memo Ex.325 at 2;2ndR.Tr.195,370-71). Beimdiek

clearly believed this evidence was admissible, regardless of the second trial judge's ruling.[2]

Immediately before Kim's 1997 testimony was read (3rdTrialTr.1122), Beimdiek made a record indicating she wanted the birthday card and two letters read to the jury and the jury should hear more than the mere fact of the letters(3rdTrialTr.1118). Beimdiek told Cundiff that should be allowed because they "directly impeac[h] [Kim's] credibility on these acts of violence that she claims to have been perpetrated against her"(3rdTrialTr.1118). Cundiff decided to rule when the matter came up(3rdTrialTr.1118-19). Despite having made a detailed record on the letters and birthday card, Beimdiek did nothing further to put their details in front of the jury(2ndR.Tr.376-77). Beimdiek testified that after Kim's 1997 testimony was read she should have offered the birthday card and letters and she failed to do so through oversight(2ndR.Tr.377-78). Beimdiek thought the birthday card and letters would be "effective tools" for challenging

[2] For the first trial, Judge Dalton, a St. Charles County judge served. *See* 1st Trial Tr. Judge O'Toole from St. Louis County served as a special judge for the second trial. *See* 2nd Trial Tr. For the third trial, St. Charles County judge, Judge Cundiff, served at the trial and St. Charles County judge, Judge Schneider, served at the post-trial juror misconduct hearing, see 3rd Trial Tr., and this second Rule 29.15. Because Judge O'Toole was not serving at the third trial, it was reasonable for Beimdiek to believe that his rulings on this issue were not binding.

Kim's veracity, even though Hirzy had used them in 1991 and Tim was sentenced to death then(2ndR.Tr.407).

All three documents impeach Kim's portrayal of Tim as a violent abuser. In particular, they impeach Kim's accusation that Tim had engaged in sexually violent acts, including one act involving a knife, the same type of behavior respondent alleged resulted in Ms. Frey's death. All the documents conveyed Kim's love for Tim and were sent by Kim after Tim was arrested on this case(1stTrialTr.956-63;Repl.Br.App.A1-17). They were impeaching generally because if Tim was a violent abuser, then Kim would not be expected to be writing him in jail to convey her love. Further, the documents impeached Kim's portrayal of Tim as someone who had committed violent sexual acts against her because her writings included detailed statements of her desires to have sex with Tim(1stTrialTr.956-63;Exs.A,B,C;Exs.218,219,220). If Tim had in fact violently sexually assaulted Kim, then she would not be expected to be writing to him expressing in detail her desires to have sex with him.

According to respondent, because this evidence was presented in the first trial and the verdict was death, it follows Tim was not prejudiced. Reliability is the yardstick against which all capital sentences must be judged. *Monge v. California*, 524 U.S. 721, 732 (1998). This Court found four of Hulshof's penalty arguments, including one that was **"grossly improper**," rendered Tim's death sentence unreliable in *Storey I*. *State v. Storey*, 901 S.W.2d 886, 900-03 (Mo. banc 1995). This evidence's persuasiveness was nullified by Hulshof's improper

arguments. For that reason, it makes no sense to say because this evidence was presented in the first trial, and death resulted there, it follows that Tim was not prejudiced by counsel's failure to present this evidence in *Storey III.*

Respondent seeks to attach significance to the documents being eight years old at the time of the third trial(Resp.Br.33). The age of the documents does not in any way undermine their power and relevance for impeaching Kim. Respondent presented Kim's second trial's testimony for the purpose of showing that Tim was abusive and had sexually assaulted her in the same ways respondent alleged he sexually assaulted Ms. Frey. If Tim had engaged in the purported acts, then Kim would not be expected to be writing him expressing her love for him and detailed descriptions of her desires to have sex with him. The age of the documents at the third trial does not help respondent.

B. Andy Posey

Throughout respondent's brief it attacks Tim's brief for not accurately stating the record. In fact, it is respondent's brief throughout that misrepresents the record and is replete with baseless personal attacks on opposing counsel in hopes of deflecting this Court's attention from the merits of Tim's claims. According to respondent: "Trial counsel correctly believed this evidence to be collateral (Exhibit 350, pp.9-10)." What respondent failed to tell this Court is that there was testimony on this issue from both trial counsel, not just one. Beimdiek would have wanted to present evidence Kim had made false claims of violence against Andy (Ex.269), he was violent towards Kim, and she believed this

evidence was relevant, **not collateral**(2ndR.Tr.197-98). Beimdiek was the one who was actually assigned to prepare the cross-examination of Kim and to challenge her veracity(Ex.350 at 9). As Tim's opening brief candidly disclosed to this Court (App.Br.46), Kenyon thought much of what Andy Posey could have said (Ex.269) was collateral(Ex.350 at 9-10). Because Kim was Beimdiek's witness, and not Kenyon's witness, Kenyon's testimony has no bearing on this claim. Moreover, Kenyon is simply wrong because Andy Posey would have severely challenged Kim's abuse accusations, testifying she had fabricated abuse accusations against him, and caused the jury to believe that was what Kim was doing to Tim. *See* App.Br.51.

Andy Posey's evidence that Kim had fabricated abuse accusations against him would have substantially undermined Kim's credibility. Under *State v. Long*, 140 S.W.3d 27, 30-31 (Mo. banc 2004), extrinsic evidence of a witness' prior false allegations is admissible when a witness' credibility is "a key factor in determining guilt or acquittal." Kim's credibility was a key factor in determining whether Tim was sentenced to death or life. Respondent called Kim and presented her prior testimony to show that Tim was a person who had committed violent sexual acts against her and he had done the same to Ms. Frey, and thereby, made this crime more aggravated and deserving of death. Kim was respondent's crucial link for claiming Tim had engaged in similar sexually violent behavior in the past with Kim and had done so again with Ms. Frey.

Andy Posey would have testified that he knew that Kim had made false claims that he was violent towards her(Ex.269). Respondent asserts that this evidence would constitute mini trials on collateral issues which would be prohibited under *Long*(Resp.Br.35-36). In *Long*, this Court did acknowledge that extrinsic evidence can pose such a risk, but a fact finder should be allowed to hear extrinsic evidence when it involves "a central issue." This Court also indicated that an issue is a "central one," and not collateral, if it is "a 'crucial issue directly in controversy.'" *Long*, 140 S.W.3d at 30. A central issue in this case was whether Tim had physically and sexually abused Kim or had Kim fabricated he had done such things. Respondent made this a central issue when it injected such matters into Tim's case by presenting Kim's second-trial testimony that Tim had engaged in acts of physical and sexual violence towards her. There is substantial independent reason to believe that Kim's accusations are false based on her two letters and the birthday card, which makes it that much more critical that the jury have heard all relevant information, including that Kim had made false abuse accusations against Andy Posey.

Tim's third trial commenced in September, 1999(3rdTrial Tr.3). In February, 1999, this Court decided *State v. Thompson*, 985 S.W.2d 779 (Mo. banc 1999). In *Thompson* this Court stated as follows:

> Generally, both the state and the defense are given **wide latitude to introduce any evidence** regarding the defendant's character that assists the jury in determining the appropriate punishment. *State v. Clay*, 975 S.W.2d

121,132 (Mo. banc 1998). This is so because "[t]he decision to impose the death penalty, whether by a jury or a judge, is the most serious decision society makes about an individual, and the decision-maker is entitled to any evidence that assists in that determination." *State v. Debler,* 856 S.W.2d 641, 656 (Mo. banc 1993).

Thompson, 985 S.W.2d at 792 (emphasis added).

Respondent asserts that because *Long* was decided five years after the third trial that counsel could not have been ineffective(Resp.Br.35). Establishing that Kim had fabricated her abuse accusations against Tim related to Tim's character and would have assisted the jury to determine the appropriate punishment and the jury was entitled to this evidence because it would have assisted in that determination. *See Thompson, supra*. *Thompson* was decided in 1999 before the third trial happened and more importantly was premised on decisions from 1998 and 1993. Counsel did not need to have *Long* because the 1999 decision in *Thompson*, based on decisions from 1998 (*Clay*) and 1993 (*Debler*) entitled counsel to challenge Kim's veracity through introducing evidence she had fabricated abuse accusations against Andy Posey.

C. Sheriff Brogden

For trial strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*, 108 S.W.3d 18, 25 (Mo. App., W.D. 2003). Respondent asserts that because Beimdiek was out-voted by her co-counsel Kenyon and her Division Director on whether to offer Brogden's deposition that

was a strategic choice which is unchallengeable(Resp.Br.36). That decision, however, was not reasonable strategy.

Beimdiek testified that the disagreement that resulted in Brogden's 1999 deposition not being offered was caused by Cundiff having excluded some testimony taken during that deposition(2ndR.Tr.201-03). Cundiff had ordered redacted from Brogden's deposition testimony that he did not consider Tim to be violent (3rdTrial Tr.1529-30;Ex.262 at 84-85) and Tim does not have a significant criminal history (3rdTrialTr.1531-32;Ex.262 at 86-87).

Kenyon testified that they did not offer Brogden's 1999 deposition because Cundiff had sustained respondent's objections to parts and they did not want the jury to hear about Tim's motorcycle theft conviction(Ex.350 at 12-13).[3]

Beimdiek agreed evidence of Tim's motorcycle theft conviction should have been something the jury was prohibited from hearing because it was vacated(2ndR.Tr.203-04). *State v. Storey*, 986 S.W.2d 462, 465-66 (Mo. banc 1999) (*Storey II*) (State "concede[d]" it was error to admit vacated conviction). Kenyon testified that they did not object to evidence about the motorcycle case, even though that conviction was vacated(Ex.350 at 13-14).

[3] As previously noted, Kenyon's testimony about why things were not done that would have impeached Kim has no relevance because challenging Kim's veracity was Beimdiek's responsibility(Ex.350 at 9).

Brogden's 1999 deposition contained critical information relevant for impeaching Kim's abuse accusations that Cundiff had not excluded. In Brogden's 1999 deposition, he recounted that Kim talked to him about her relationship with Tim and their marital problems(Ex.262 at 87-88,94-95). Kim never reported to Brogden Tim assaulted her(Ex.262 at 88). In contrast, Kim did talk to Brogden about her father's abusive, violent acts(Ex.262 at 89). Because Kim confided in Brogden about her father's abusive acts, if Tim had in fact engaged in any abusive behavior towards her, then she would have been expected to discuss those with Brogden. Highlighting Kim's failure to report to Brogden any abusive acts by Tim under these circumstances would have served to substantially impeach her credibility.

The failure to use Brogden's deposition was not reasonable strategy. Cundiff had not excluded that portion of the deposition which would have impeached Kim's abuse accusations against Tim. Further, evidence of the vacated motorcycle theft conviction was not admissible. *See Johnson v. Mississippi,* 486 U.S. 578 (1988) (a death sentence cannot be based on a conviction that was subsequently vacated). The reasons counsel gave for Brogden's deposition not being admitted were not reasonable strategy. A strategic decision is unreasonable if it is based on a failure to understand the law. *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003). Counsel's decision, as it related to the motorcycle theft conviction evidence, was unreasonable because they did not understand the law. *See Johnson v. Mississippi, supra.*

A new penalty phase is required.

II. JURY KNEW PRIOR DEATH RESULT

The motion court clearly erred overruling Tim was denied his rights to due process, freedom from cruel and unusual punishment, a fair trial, a fair and impartial jury, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, when counsel failed to call Judge Cundiff at the juror misconduct hearing before Judge Schneider to testify after he told the jurors Tim was previously death sentenced a juror stated "I knew that" and failed to call Bailiff Paulson to testify he saw a juror nodding affirmatively in response to Cundiff because juror misconduct was established when Cundiff disclosed what he heard, reasonable counsel would have investigated Paulson because the State's own attorney (Ahsens) represented at the posttrial juror hearing that there were two bailiffs, not one, who had knowledge relevant to this issue such that Judge Cundiff thereby had not excluded Paulson as a bailiff with critical relevant information and respondent's other attorney (Moss) had spoken to Paulson about this issue.

Respondent makes several arguments which the decision in *Dorsey v. State*, 156 S.W.3d 825 (Mo. App., W.D. 2005) establish have no merit. The *Dorsey* Court concluded that trial counsel was ineffective for failing to present evidence to prove juror misconduct. *Id.* at 832-33. This Court should do the same here because it was established the jury knew of the prior death verdicts before it rendered its verdict.

In *Dorsey*, a juror went to the crime scene to investigate the victim's testimony about getting lost in the area and had the same experience. *Dorsey*, 156 S.W.3d at 828. That juror informed the other jurors about what happened. *Id.* at 828. After the verdict the trial judge's law clerk and the prosecutor learned about the juror's trip and that the juror had informed the other jurors about what had happened. *Id.* at 828. Both submitted written court memos that were supplied to Dorsey's trial counsel. *Id.* at 828.

The motion for new trial in *Dorsey* mentioned the juror misconduct, but counsel failed to present any evidence in support of that motion. *Id.* at 828. The postconviction motion presented a claim that trial counsel was ineffective for failing to present evidence to support the juror misconduct claim. *Id.* at 829. At the postconviction hearing, the juror who committed the misconduct and two other jurors were called to testify. *Id*. at 829. The juror who engaged in the misconduct testified that he did not think his experience influenced him or the other jurors. *Id.* at 831. The other two jurors testified they also were unaware of any effect from the juror who committed the misconduct. *Id*. at 832. The law clerk testified at the 29.15 hearing and the memos from the law clerk and the prosecutor also were presented. *Id. at* 829. The evidence presented to the 29.15 court established juror misconduct took place. *Id.* at 831.

Dorsey's trial counsel's 29.15 testimony "did not inspire confidence." *Id.* at 829. Counsel failed to offer a strategic reason for failing to conduct his own investigation of the jury misconduct. *Id.* at 829.

Respondent asserts that no misconduct was established(Resp.Br.38-39). When Cundiff testified that he heard a juror say "I knew that" in response to him telling the jurors about the prior verdicts, misconduct was in fact established. To support its argument respondent quotes from the 29.15 findings (Resp. Br. 38) which stated the following: "Judge Cundiff made it clear in his deposition that he had no way of knowing or assuming the comment the juror made was in response to him telling the jurors about movant's past trials (Cundiff depo., pp.12-14)." (Findings - R.L.F.814). As the Appellant's Original Brief pointed out (App.Br.59), this finding, while citing Cundiff's deposition, has no support in the pages cited. Instead, those deposition pages show Cundiff only referenced his hearing limitations as to what it was he had heard, but shortly after the occurrence knew he had "heard it loud and clear"(3rdTrialTr.1714). *See* App. Br. 59. Judge Cundiff surely would not have reported these matters to defense counsel if he did not believe the juror made the "I knew that" statement. Moreover, that is evident from Cundiff's statement at the October 27th hearing in which he stated: "I'm confident that one of those jurors or more of those jurors is going to have heard the same thing that I heard."(3rdTrialTr.1722).

Once again respondent has misrepresented the record and ignores the statement of its own prosecutor, Ahsens, and actions of its other prosecutor, Moss. According to respondent counsel could not have been ineffective for failing to call Paulson because "Judge Cundiff further indicated that he spoke to Paulson, who did not hear anything (Trial III Tr.1712-18)"(Resp.Br.40). In the referenced

transcript pages from a posttrial hearing with Cundiff prosecutor Ahsens stated the following: "You [Judge Cundiff] have also told us that there was **a bailiff** standing right next to you who did not recall hearing that." (3rdTrialTr.1718) (emphasis added). The transcript did not specify that Paulson was the bailiff who Cundiff spoke with about this matter. At the subsequent juror misconduct hearing in front of Schneider, Ahsens stated the following:

> We have **two bailiffs** who can tell you that [sic] they heard. Based on that, it may be sufficient information for the Court to make a decision as to whether there is sufficient indicia of juror misconduct to proceed to question the jury and invade in fact the verdict by questioning.

(Jur.Hrg.Tr.6) (emphasis added).

Paulson testified in his 29.15 deposition that he did not have a conversation with Cundiff about what transpired when he was in the juryroom with Cundiff(Ex.349 at 8). Paulson did, however, talk to the other prosecutor, Moss, about what took place in either late 1999 or early 2000(Ex.349 at 8,10). The next time anyone talked to Paulson was when Tim's 29.15 Public Defender investigator spoke to him(Ex.349 at 9). Paulson's testimony included that "nearly every bailiff in that courthouse was with the jury at some point over the course of that week." (Ex.349 at 15). Paulson testified that when Cundiff was talking to the jury, there was a second bailiff also present, Don Messner(Ex.349 at 15).

What this record establishes is that if Cundiff spoke to any bailiff, then it was not Paulson. Trial counsels' motion to question jurors had moved that the

court allow them "to conduct an inquiry of all members of the jury and members of the sherifff's department…."(Ex.333 at 1). Specifically, the motion asked that counsel be allowed to do the following: (1) individually question "all St. Charles County Sheriff's deputies sworn to keep and maintain the jurors" (Ex.333 at 4); and (2) question "the jurors and sheriffs involved in [Tim's] case" (Ex.333 at 7). If counsel had acted as reasonable counsel, then they would have investigated all deputies responsible for the jury, including Paulson, and learned that he was able to confirm what Judge Cundiff had heard - that the jury knew Tim had been sentenced to death before. Significantly, respondent's counsel Moss had spoken to Paulson, but Tim's counsel did not. That reasonable counsel would have contacted Paulson is underscored by the State's counsel having spoken to Paulson. Like counsel in *Dorsey*, there was no strategic reason for failing to investigate and call Paulson, especially since Tim's counsel had asked to question all bailiffs responsible for the jury.

According to respondent, Tim's brief makes the "astounding and unjustified accusation" that the jurors "were less honest and truthful" and the brief is "lacking in any authority"(Resp.Br.39). The original brief discussed *State v. Tirado*, 599 S.E.2d 515 (N.C. 2004) which reviewed the jury not having been timely polled about their verdict as required by statute(App.Br. at 61). The *Tirado* Court observed the following:

> Under these circumstances, we believe it unlikely that any juror who was wavering when the verdict was returned on 7 April would have expressed any doubts when polled on 11 April.

Tirado, 599 S.E.2d at 538. What *Tirado* recognized was that there are pressures on jurors once they have rendered a verdict that make them reluctant to be forthcoming with disclosing relevant information which calls into question that verdict's validity and those pressures are only accentuated with the passage of time.

Trial counsel argued to Cundiff that the longer he postponed granting a hearing "the less likely we are to get honest, truthful and complete information at any subsequent hearing."(3rdTrialTr.1732). The *Dorsey* Court explicitly recognized Tim's trial counsel's concerns. The *Dorsey* Court noted:

> When juror misconduct involves the gathering of extraneous evidence by a juror, the presumption of prejudice is not easily overcome. In disproving prejudice, jurors' statements that the misconduct did not affect their deliberations "ha[ve] 'little probative value' because of the common tendency of jurors to minimize the effect of misconduct." (Citations omitted).

Dorsey, 156 S.W.3d at 832 (alteration in opinion). The *Dorsey* Court further noted: "The jurors' own protestations in this regard are given little weight, for reasons that are obvious." *Dorsey*, 156S.W.3d at 832. In Tim's case, these same considerations made the jurors unwilling to be forthcoming about their knowledge

of the prior death verdicts at the post-trial juror hearing conducted in front of Schneider.

It was critical for Judge Schneider to have heard at the post-trial juror misconduct hearing from both Judge Cundiff and Paulson. The State wants to dismiss what Judge Cundiff heard as a mistake as to what it was he heard because when Cundiff informed the jury of the prior verdicts the jurors were talking among themselves(Resp.Br.40). If Schneider had had at the post-trial hearing evidence from Cundiff and Paulson, then their testimony when viewed in conjunction with one another refutes respondent's assertion that Cundiff was simply mistaken as to what he heard. As *Dorsey* indicated, under situations like those presented here, the presumption of prejudice is not easily overcome. *See Dorsey, supra*. Cundiff noted he had been meticulous during voir dire to not ask any question that would have revealed Tim was previously death sentenced(3rdTrialTr.1724-25). Cundiff had also directed pretrial that all parties and witnesses were not to reference the prior death verdicts(Ex.333 at 2). From the outset the prejudicial nature of this information was recognized, and therefore, the jury's verdict cannot be viewed as reliable. *See Monge v. California*, 524 U.S. 721, 732 (1998).

A new penalty phase is required.

III. JUROR TESTIMONY PROHIBITED

The motion court clearly erred prohibiting 29.15 counsel from calling jurors to testify at depositions and at the 29.15 hearing because those actions denied Tim his rights to due process, a full and fair hearing, to be free from cruel and unusual punishment, and to prove ineffective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that at the juror misconduct hearing in front of Schneider the jurors should have been told that when Cundiff was in the juryroom and he informed the jury of the prior death verdicts he heard a juror say "I knew that" and the jurors should have been asked who the juror was that made that statement because Judge Cundiff was "confident" one or more jurors had heard what he heard as such inquiry does not constitute "impeaching the verdict."

Respondent argues against allowing 29.15 counsel to question the jurors about Judge Cundiff having heard a juror say "I knew that" in response to him telling the jurors that Tim was previously sentenced to death because it constitutes "impeaching the verdict"(Resp.Br.41-42). The questioning that should now be allowed does not seek to impeach the verdict.

Respondent states that it is improper to impeach a verdict as to misconduct inside or outside the juryroom and cites *State v. Fleer*, 851 S.W.2d 582, 595 (Mo. App., E.D. 1993) for this general proposition(Resp.Br. at41-42). *Fleer* in turn cites *Stotts v. Meyer*, 822S.W.2d 887,889 (Mo App., E.D. 1991) which itself relied on this Court's decision *Baumle v. Smith*, 420 S.W.2d 341, 348 (Mo.1967). This

Court's definition in *Baumle* of what constitutes "impeaching the verdict" establishes that is not what is sought to be done here. In *Baumle* this Court defined the types of actions that constitute "impeaching the verdict." Those are:

> No one is competent to impeach a verdict by the making of an affidavit as to matters inherent in the verdict, such as that the juror did not understand the law as contained in the court's instructions, or that he did not join in the verdict, or that he voted a certain way due to a misconception of the evidence, or misunderstood the statements of a witness, or was mistaken in his calculations, or other matters 'resting alone in the juror's breast.' (citations omitted).

Baumle, 420 S.W.2d at 348. What is sought to be inquired about in Tim's case does not involve any matter that this Court identified in *Baumle* as impeaching the verdict. Instead, the inquiries to be made about Tim's case go to the jury having information it was prohibited from having in rendering its verdict and how the jury obtained that prohibited information. The intended inquiries go to the kinds of issues discussed in Point II of this reply brief and recognized in *Dorsey v. State*, 156 S.W.3d 825 (Mo. App., W.D. 2005) as the proper subject of questioning directed to jurors about their verdict. *See* Reply Brief Point II, *supra*.

At the proceedings conducted in front of Judge Cundiff on October 27th, he stated: "I'm confident that one of those jurors or more of those jurors is going to have heard the same thing that I heard."(3rdTrialTr.1722). The amended motion alleged that counsel was ineffective for failing to: (1) question the jurors telling

them when Cundiff came to the juryroom a juror indicated he knew Tim was previously death sentenced and to ask who the juror was who made that disclosure(2ndR.L.F.119-20). This inquiry would elicit the very information that Cundiff said he was "confident" other jurors must have heard. In contrast, the questions asked were did you: (1) serve; (2) know before being sworn Tim was previously death sentenced; (3) during trial learn from media about prior results; and (4) learn from any person, other than another juror, about prior results(*See*,*e.g*.,Jur.Hrg.Tr.16-17). None of these questions focused on what happened when Cundiff was with the jurors and, not surprisingly, failed to elicit evidence relevant to the juror misconduct.

Respondent asserts that it is inconsistent to argue that a hearing conducted two months after the verdict was not sufficiently timely and that having a hearing now several years later will successfully uncover the juror misconduct that occurred(Resp.Br.42). The arguments presented are not inherently at odds with one another. The decision in *Dorsey* recognized that there are practical realities that cause jurors to be less than willing to be forthcoming about juror misconduct. *See* Reply Brief Point II, *supra*. Schneider's questioning was not geared towards overcoming the problems *Dorsey* recognized. The intended questioning, unlike the questioning that was done, would immediately apprise the jurors that Judge Cundiff had a first hand basis to suspect juror misconduct since he was present in the juryroom and heard someone say "I knew that." Approaching the questioning from that perspective would cause the jurors to be willing to be forthcoming, even

now, about what happened because they would know what it is that Judge Cundiff knows. In Cundiff's deposition, he described a situation in another murder case he presided over where during the trial he acquired information that there had been juror misconduct(Ex.298 at 21-22). When Cundiff presented to the jurors involved what he knew, they admitted that the improper conduct had taken place(Ex.298 at 21-22). A similar result here is likely to happen if the jurors are told at the outset what Cundiff heard said in response to his statement that Tim was sentenced to death before.

This Court should reverse to allow all jurors to be questioned about one of them knowing Tim was previously death sentenced.

CONCLUSION

For the reasons discussed in the original appellant's brief and this reply brief, Tim Storey requests: Points VI, IX, XII vacate his convictions and sentences; Points I, II, IV, V, VI, VII, IX, X, XI, XII, XIII vacate his death sentence; Point VIII impose life without parole; and Point III a remand to allow jurors to be questioned.

Respectfully submitted,

_____
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Certificate of Compliance and Service

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the reply brief contains 7,070 words, which does not exceed twenty-five percent of the 31,000 words allowed (7,750) for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were _____ this ____ day of _____, 2005, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

_____
William J. Swift

APPENDIX

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